IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-86

BLAIR LEE III, ACTING GOVERNOR OF THE STATE OF MARYLAND, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AN AGENCY OF THE UNITED STATES, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FRANCIS BILL BURCH,
Attorney General of Maryland,
GEORGE A. NILSON,
Deputy Attorney General,
DAVID H. FELDMAN,
Assistant Attorney General,
Chief of Litigation,
WALTER G. LOHR, JR.,
Special Assistant Attorney General,
1400 One South Calvert Building,
Baltimore, Maryland 21202,
(301) 383-3737,

Attorneys for all Petitioners except Petitioner Board of Trustees of the Community College of Baltimore,

BENJAMIN L. BROWN,
City Solicitor of Baltimore,
AMBROSE T. HARTMAN,
Deputy City Solicitor,
WILLIAM HUGHES,
Chief Solicitor,
City Hall,
100 North Holliday Street,
Baltimore, Maryland 21202,
(301) 396-3100,

Attorneys for Petitioner Board of Trustees of the Community College of Baltimore.

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes, Rules and Regulations

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

BLAIR LEE III, ACTING GOVERNOR OF THE STATE OF MARYLAND, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AN AGENCY OF THE UNITED STATES, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Blair Lee III, Acting Governor of the State of Maryland (as successor to Marvin Mandel, Governor of the State of Maryland); State of Maryland; Maryland State Board for Community Colleges, State Board for Higher Education (as successor to Maryland Council for Higher Education), Board of Trustees of Morgan State University, Board of Trustees of St. Mary's College of Maryland, Board of Trustees of the State Colleges of Maryland, and The University of Maryland, each a separate agency of the State of Maryland; and Board of Trustees of the Community College of Baltimore, an agency of the Mayor and City Council of Baltimore, on behalf of itself and all other Public Junior and Community Colleges of the various political subdivisions lying within the State of Mary-

land, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on February 16, 1978.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland, filed on March 8, 1976, and amended in minor respects on March 25, 1976, is reported in *Mandel v. United States Department of Health, Education, and Welfare*, 411 F. Supp. 542 (D. Md. 1976), and appears in the separately printed appendix to this petition (A. 1a). The unreported order of the district court that was appealed to the United States Court of Appeals for the Fourth Circuit was filed on March 9, 1976 (A. 44a). The reported opinion of the district court denying a stay pending appeal, filed April 20, 1976, is published as *Mandel v. United States Department of Health, Education, and Welfare*, 417 F. Supp. 57 (D. Md. 1976) (A. 48a).

The unreported order of the United States Court of Appeals for the Fourth Circuit consolidating the appeal in this case with one in the similar Baltimore City case with which it was decided in the district court, denying stays pending appeal and motions to expedite the appeals in both cases, and deferring the suggestions for hearings in banc, was filed on May 28, 1976 (A. 52a). The unreported order of the court of appeals granting rehearing in banc was filed December 10, 1976 (A. 53a). The original opinions of the court of appeals were filed August 9, 1977, and the separate opinion of Judge Hall on August 25, 1977; they are reported collectively as *Mayor and City Council of Baltimore v. Mathews*, 562 F.2d 914 (4th Cir. 1977) (A. 56a). The subsequent per curiam opinion of the court of appeals, withdrawing the original opinions and affirming by an equally divided court the orders of the district court, together with the

concurring and dissenting opinion of Judge Winter, was filed on February 16, 1978, and is reported as *Mayor and City Council of Baltimore v. Mathews*, 571 F.2d 1273 (4th Cir. 1978) (A. 91a). The unreported order of the court of appeals, granting respondents an extension of time within which to file a petition for rehearing until March 16, 1978 (which thereafter was not filed) was entered on February 28, 1978 (A. 97a).

The unreported order of the Chief Justice, extending the time to file a petition for certiorari to and including July 16, 1978, was filed on May 15, 1978 (A. 100a).

JURISDICTION

The original judgment of the court of appeals was entered on August 9, 1977. Petitioners filed a timely motion to withdraw the opinion and to modify the judgment, and, in the alternative, a petition for rehearing in banc which was granted on February 16, 1978, on which date a revised judgment was entered.

Thus, in accordance with 28 U.S.C. § 2101(c) and Rule 22.3 of this Court, the petition originally was due to be filed on or before May 17, 1978. On May 15, 1978, however, in response to an application under Rule 34.2 of this Court, the Chief Justice entered an Order, No. A-947 (A. 100a), authorized by 28 U.S.C. § 2101(c), extending the time for filing a petition for a writ of certiorari in this case to and including July 16, 1978. Because July 16, 1978, the expiration date of the sixty day extension granted, falls on a Sunday, under Rule 34.1 of this Court, the petition is required to be and is being filed not later than Monday, July 17, 1978.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether HEW violated title VI of the Civil Rights Act of 1964 by failing to issue regulations meeting applicable statutory criteria.

2. Whether HEW exceeded its statutory authority by refusing to conduct its title VI compliance activities on a program-by-program and institution-by-institution basis.

3. Whether HEW disregarded title VI by differentiating between states with a history of legal segregation and those with no such history.

4. Whether HEW violated title VI by refusing to engage in good-faith efforts to resolve alleged noncompliance by voluntary means.

5. Whether HEW exceeded its statutory authority under title VI by commencing administrative fund termination proceedings against all public institution of higher education in the State without complying with the jurisdictional prerequisites to the proceedings.

STATUTES AND REGULATIONS INVOLVED

United States Code (1976 ed.; vol. 1, pp. 332-34), Title 5, Sections 701-706:

These provisions appear in the separately printed appendix (A. 100a).

United States Code (1970 ed.; vol. 9, pp. 10290-92), Title 42, Sections 2000d-2000d-6:

This statute is set forth in the appendix (A. 104a)

Code of Federal Regulations (1977 ed.; vol. 45, parts 1-99, pp. 315-33), Title 45, Subtitle A, Part 80 (§§ 80.1-80.13):

The text of these regulations is reprinted in the appendix (A. 109a).

STATEMENT OF THE CASE

Introduction

The United States, in large part through the Department of Health, Education, and Welfare, extends federal financial assistance to each of the public institutions of higher education in the State of Maryland and to virtually every such institution in the United States. This assistance is made available under widely diverse statutory aid programs applicable to particular activities of the institutions and to the financial and other circumstances of their students.

The dispute in this case grows out of long disregard by HEW and its officers of an important federal law, title VI of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000d-2000d-6.[1] This disregard has been to the detriment of the public institutions of higher education in the State of Maryland,[2] but the Maryland experience

[1] The basic command of title VI, long followed by petitioners, is found in 42 U.S.C. § 2000d. It provides that, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Both title VI itself and the HEW regulations promulgated thereunder, 45 C.F.R. §§ 80.1-80.13, require HEW to focus its enforcement activities on particular statutory "programs" of federal financial assistance and on particular institutional "recipients" of that assistance. In addition, at the heart of title VI is a determination by Congress that "compliance . . . be secured by voluntary means," 42 U.S.C. § 2000d-1, if at all possible. Thus, after a violation has been properly found, notice to the recipient and good faith efforts to remedy the alleged discrimination are clearly required. *Id.* Over the years, HEW and a succession of its officers have ignored these commands, and they continue to do so.

[2] Petitioners are referred to hereinafter as the "State," and respondents as "HEW." HEW's Office for Civil Rights is referred to as "OCR."

The collective designation of petitioners as the "State" is not intended to imply that all petitioners are state agencies. On the contrary, the public junior and community colleges

is only an example of HEW maladministration of a law that affects all Americans. Ironically, although charged with enforcing title VI, HEW has ignored the commands of the statute in administering it. "This case is an important one with national implications,"[3] as is indicated by the support for HEW by the NAACP Legal Defense and Educational Fund, Inc., and for the State by the five leading national associations in the field of higher education and the Attorneys General of thirty-four states.[4] Unfortunately, HEW's current course apparently will not be altered until an authoritative ruling is issued by this Court, and neither petitioners nor the rest of the country should wait any longer for the resolution of the important issues presented by this case.

HEW's Abuse of Power

HEW's title VI activities in the State of Maryland began with a letter dated March 12, 1969, addressed to the governing boards of certain of the public institutions of higher education in the State. No specific violations of title VI or of any regulations promulgated thereunder were alleged. Nevertheless, citing racial statistics on student enrollment of certain institutions, the letters requested submission of a plan for eliminating alleged racial segregation. On October 1, in response to the threat to the State's continued eligibility to receive federal financial assistance, the State submitted for consideration by HEW a plan to assure the elimination of any segregation. HEW rejected the

are operated by the various political subdivisions lying within the State and are subject to only limited state controls.

[3] Mayor and City Council of Baltimore v. Mathews, 571 F.2d 1273, 1276 (4th Cir. 1978) (Winter, J., concurring and dissenting) (A. 94a).

[4] See notes 22 and 23, *infra* at 22-23.

plan, and after further interchange a second plan was submitted on December 1, 1970.

From December 1, 1970, until March 27, 1973, there was no communication from HEW with respect to the second plan or title VI compliance in general.[5] In a letter on March 27, 1973, HEW requested further information from the State with respect to the compliance status of the various public institutions. On May 21 HEW notified the six "State Colleges" and the University of Maryland that they were considered to be out of compliance with the provisions of title VI. Specifically, HEW concluded that, based upon "present disparities in the racial composition of the faculties and student bodies among the various institutions of the Maryland state system of higher education," the "prior dual system of higher education based on race" had not been fully disestablished. The May 21 letters demanded submission of a revised plan within three weeks, after almost three years of complete inaction by HEW.

In a letter of May 30 the State expressed, on behalf of the institutions, their inability to comply with the schedule for submitting the revised plan. In that letter, the State requested specificity about the requirements of title VI and the specific legal authority justifying HEW's actions. In response, the Director of OCR dispatched a letter on June 6 which cited two cases not involving title VI or HEW in any way and failed to

[5] The lack of communication was attributable to HEW's doubt about the proper methods of title VI enforcement in higher education. The renewed interest in the spring of 1973 did not represent further reflection by HEW and enlightenment on the proper approach, but was a direct response to a court ordering the commencement of title VI compliance activities with respect to a number of states, including Maryland. The court had directed that compliance be obtained by June 16, 1973. Adams v. Richardson, 356 F. Supp. 92 (D.D.C.), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973). None of the states affected by the order was a party to the litigation.

specify any violations by public institutions in Maryland.

Following six months of informal exchanges,[6] in early 1974 the State submitted yet another plan for assuring the elimination of any segregation in the public institutions of higher education in the State.[7] In a letter of April 22, 1974, HEW furnished ten pages of criticism of the most recent Maryland plan and requested a revised version by June 1, but again failed to specify any violations of title VI. On May 3 the State reiterated its request that HEW specify the requirements of title VI and the legal basis for those requirements. HEW's response of May 15 only referred to title VI itself and to the HEW regulations promulgated thereunder and expressed the hope that "we are not returning to such a debate at this late date." The State provided a revised version of the plan on May 30.

HEW communicated to the State its unconditional acceptance of the Maryland plan in a mailgram on June 21, confirmed by letter of July 19, 1974. The letter stated HEW's intention to "closely monitor the implementation of the plan, particularly in the first two years of its life." Those two years were to expire on July 19, 1976, but HEW began to object to the approved Maryland plan almost immediately after its acceptance.

By letter dated September 19, 1974, the Director of OCR, Peter Holmes, informed the Executive Director of the Maryland Council for Higher Education that primary responsibility for reviewing the implementation of the Maryland plan had been delegated to the Philadelphia Regional Office of OCR headed by Respondent Dodds.[8] Less than three months after referral of the plan to the Region III office, in an undated letter received on December 11, Mr. Dodds asked over one hundred questions concerning the plan itself and requested a response to those questions within thirty days of receipt of the letter.[9]

[6] The deadline imposed upon HEW by the district court in Adams v. Richardson had meanwhile been extended by the court of appeals.

[7] In the letter of transmittal accompanying the plan Governor Mandel noted that, despite the lack of direction from HEW during the three-year period of silence, the State had made substantial progress in implementation of its 1969 plan.

On February 14, 1975, the State submitted to HEW the "First Annual Desegregation Status Report (February 1975)." The report contained approximately 600 pages of data reflecting the substantial progress that had been achieved in the implementation of the plan. The report, however, was largely unread by respondents, who throughout the entire course of communication, concentrated almost solely on statistics concerning the racial composition of full-time undergraduate students in the various institutions.

On August 1 the State formally transmitted to HEW the "First Mid-Year Desegregation Status Report (August 1975)." That report went unconsidered by respondents, although it evidenced progress made by the State in the public institutions of higher education implementing the previously approved plan. In fact, long before submission of the First Mid-Year Report, HEW had decided to send a letter to the State noting deficiencies in the plan and demanding corrective action.

The result of this decision was a letter on August 7 from HEW to Governor Marvin Mandel that demon-

[8] At that time, Mr. Holmes relinquished his personal control of the title VI enforcement activities for higher education in the State of Maryland, delegating that responsibility to individuals who had been opposed to acceptance of the plan from the beginning.

[9] In the State's view, acknowledged by the district court, this letter represented a "renewed attack on the plan" and a "de facto revocation of the prior approval." 411 F. Supp. at 548 n.15 (A. 12a n.15).

strates HEW's intention to control higher education, and even the legislative process, in the State. Matters formerly thought to be within the educational discretion of the administrators of the various institutions or within the legislative discretion of the Maryland General Assembly were now to be subject to HEW revision and approval.[10] It would have been impossible for the State to comply with all of the demands made in

[10] The letter demanded that HEW's Office for Civil Rights be furnished with procedures and standards by which the institutions must award credit for skills acquired outside the academic setting. The institutions were required to allocate financial resources for remedial programs, and to overcome financial handicaps, inadequate educational backgrounds, and unfair and discriminatory social conditions. Presumably, the programs and the resource allocations were in all respects subject to the approval of HEW. HEW was also to be involved in the hiring process, for Governor Mandel was ordered to utilize new faculty positions "to correct existing imbalances in the racial distribution of faculty." None of these demands was tied to involvement of federal financial assistance at any or all of the institutions affected. Similarly, the letter demanded a reform of the state scholarship program, which involves no federal dollars. Dissatisfied with the nature and extent of powers given the Maryland Council for Higher Education by the laws of the State of Maryland, HEW demanded that those powers be increased.

Most significantly, HEW asserted approval power over admissions policies and curriculum offerings at the various institutions. Apparently, academic decisions were to be made with an eye to desegregation in the areas of "academic program, facilities, establishment of new institutions, and admissions policy modifications." No new programs could be implemented at any of the institutions without submitting to HEW a justification that each new program "will in no way impede desegregation." All contemplated new facilities had to be submitted for HEW's approval in the form of a "proposal" with a justification that construction or modification "will in no way impede desegregation."

Indeed, HEW has demanded that the State analyze the "roles" of each of the public institutions of higher education in the State and promptly "redefine" them with a view to desegregation. Thus, HEW's approach to title VI enforcement has led it to assert the right to govern all higher education in the State.

the letter of August 7 within the specified time periods. In fact, many of the demands were themselves impossible of performance within the specified time periods, and HEW knew this at the time the letter was sent.[11]

In a letter of August 13 Governor Mandel exposed the August 7 letter as a "unilateral repudiation by the Office for Civil Rights of the plan itself and of OCR's approval of it a year ago." There followed efforts to resume negotiations, including a number of meetings and discussions between representatives of the State and HEW. Indeed, by letter dated September 26, the Director of OCR, Peter Holmes, informed the State that the time limits imposed by the August 7 letter were to be held in abeyance. This representation that the time limits were in abeyance was never rescinded.

[11] For example, amendment of the state scholarship program required legislative action, and HEW officials knew that the state legislature was not in session at the time of the letter and would not be in session within the time periods given for completion.

The district court found that certain of the times specified in the letter for completion of various demands were "unreasonable" and "outrageous." 411 F. Supp. at 548 & 548 n.17 (A. 12a & 12a-13a n.17). The district court also cited the testimony of then-Lieutenant Governor Blair Lee III, characterizing the letter, addressed to the Governor of the State of Maryland, as a "terrible letter" employing the most "peremptory kind of language" possible. 411 F. Supp. at 548 n.16 (A. 12a n.16).

The sudden dispatch of the August 7 letter, in advance of the scheduled receipt of the imminently forthcoming First Mid-Year Report, was precipitated by agitation on the part of the plaintiffs in the Adams v. Richardson case. The plaintiffs in *Adams* had been dissatisfied with the Maryland plan since its acceptance and had been agitating for further action by HEW. Respondent Burton Taylor, then Chief of the Policy Planning and Program Development Branch of the Higher Education Division of OCR, attributed the unusual pressure put upon him to complete his review of the letter to the filing, at the very end of July, of a motion for further relief by the plaintiffs in the *Adams* case.

Subsequently, however, Defendant Martin Gerry assumed Mr. Holmes' duties on an acting basis. Within two weeks, without warning, there was dispatched to the State a letter dated December 15 in which fund termination proceedings were announced.[12] Indeed, before receipt of the letter by the State, HEW officials held a press conference to discuss the importance of their actions and announce the imminent commencement of administrative enforcement proceedings in which all federal financial assistance through HEW to all public institutions in the State, as well as federal financial assistance distributed to the institutions through other agencies, would be at risk.

Proceedings in the District Court

Three weeks later, on January 5, 1976, the State of Maryland, its Governor, certain state agencies involved in higher education, and the public institutions of

[12] The reasons for the December 15 letter became apparent at the hearing before the district court. On August 29, 1975, Mr. Gerry (then Acting Director of OCR during Mr. Holmes' illness) had advised then-Secretary Mathews to commence enforcement proceedings because it would assist in the *Adams* litigation, stating:

> In any event, the initiation of an enforcement action will greatly assist in building our credibility with other states and with the court [in *Adams*].
>
> The other issue presented is really a symbolic one. If we initiate enforcement action against Maryland we have the option of also deferring the state's eligibility for new Federal funding. As best we can determine, very little money would be affected by such a decision. It would, however, be regarded by the civil rights groups as a symbol of our sincerity in putting maximum pressure on institutions to voluntarily comply. For these reasons, we recommend in favor of imposing the deferral.

In an *"ACTION MEMORANDUM"* of the same date, Mr. Gerry advised Secretary Mathews that failure to commence administrative enforcement proceedings "could seriously jeopardize our position in the current *Adams* litigation" and that bringing such proceedings would appease civil rights groups and "quiet" the Governor.

higher education located in the State filed suit in the United States District Court for the District of Maryland against HEW and certain of its officers.[13] Filed with the complaint was an application for temporary,[14] preliminary, and permanent injunctive relief seeking the restraint of certain actions by HEW alleged to be arbitrary and capricious, unwarranted, *ultra vires*, illegal, and unconstitutional as outside the scope and in direct contravention of the legal authority of HEW and the individual defendants. Specifically, the complaint alleged that HEW had exceeded its statutory authority under title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-6, and further that HEW had, through actions taken in bad faith and in violation of applicable law, deprived the State of certain statutory rights. On January 13 HEW and the individual defendants moved to dismiss the complaint.

At evidentiary hearings before the district court on January 30 and February 2, it was demonstrated that HEW had refused to concentrate on particular statutory programs and on particular institutional recipients in administering title VI; that is, it had deliberately failed to take a "program-by-program" approach and an "institution-by-institution" approach as required by title VI. Indeed, HEW had never examined, and was only casually aware of the various statutory aid programs and of the particular institutional recipients thereof.

For example, Respondent Dewey Dodds, the Regional Civil Rights Director for Region III of OCR, could not identify a single statutory assistance program through

[13] Jurisdiction was alleged under 5 U.S.C. §§ 701-706 and 28 U.S.C. §§ 1331, 1332, 1346, 1361, and 1651.

[14] At a hearing held January 5, 1976, the district court did not grant the temporary restraining order sought by the State but scheduled a hearing on the State's application for preliminary injunction for January 30, 1976.

which federal aid is made available to any institution of higher education in the State. He was unfamiliar with the general or specific purposes for which federal aid was being utilized. He conceded that his office had never focused on particular aid programs or on the particular institutional recipients of the aid to determine whether any federal financial assistance was being utilized in a discriminatory fashion. Mr. Dodds could not cite a single specific instance of discrimination by any public institution of higher education in the State; and although he was able to enumerate specific criteria for determination of institutional discrimination, he admitted that he had no evidence that any of the institutions failed to meet any of those criteria.

Moreover, Respondent Taylor, who is now a Special Assistant to the Director of OCR, testified that the public institutions in the State were in violation of title VI and the HEW regulations promulgated thereunder. However, he also admitted that he had made no analysis of the various programs of federal financial assistance through which funds are distributed to the various institutions, as did Defendant Martin Gerry, then Acting Director (later Director) of OCR, and Peter Holmes, Mr. Gerry's predecessor as Director of OCR.

Just as respondents conceded their failure to analyze the utilization of federal aid under the various statutory programs, they also conceded their failure to analyze each of the particular public institutions to determine the existence of discrimination, either generally or in the use of federal financial assistance. Respondents acknowledged that for purposes of title VI compliance each public institution of higher education in the State is a "recipient" as defined in the statute and regulations. When read a list of the public institutions of higher education in the State, Mr. Dodds acknowledged that he knew of no discrimination at any of them.

He identified the title VI problem as being the existence of "vestiges of the dual system." Asked to identify the vestiges, Mr. Dodds stated that students "continued to go to school based on the race of the institution that exist there." After further questioning, it became apparent that the alleged title VI problem in Maryland did not arise from HEW's belief that white students choose to go to predominantly white institutions or that predominantly white institutions discriminate against blacks or attract them in insufficient numbers. The core of the problem was that black students choose to go to predominantly black institutions.

Thus, the HEW approach had been to impute a problem perceived by it in certain predominantly black institutions to the remaining institutions without evidence—indeed, without looking for evidence. Mr. Taylor's testimony demonstrated the HEW approach. Asked what evidence he had that Frostburg State College violates title VI, he was able to respond only that it is "part of the Maryland public higher education system." Mr. Taylor conceded that Hagerstown Junior College finds its federal financial assistance in jeopardy not because it has been involved in discrimination but because it would be useful in fashioning a remedy to the general title VI problem perceived by HEW.[15]

[15] He acknowledged that the various public community and junior colleges operated by the political subdivisions of the State, including Hagerstown Junior College, had never been part of a legally "dual" system and that they bore no "vestiges of racial duality." He conceded that HEW had made no attempt to determine compliance with Title VI by particular institutions, that is, by particular "recipients" of federal financial assistance. He added that the "remedy" approach had been taken not only with respect to the public junior and community colleges in the State but also with respect to other institutions of public higher education in Maryland.

Defendant Gerry's testimony concerning Garrett Community College was particularly instructive. He was asked in detail how Garrett Community College violated title VI.[16] Mr. Gerry had no evidence that any black students failed to attend Garrett Community College because of the existence of predominantly black institutions in the State. He had no evidence that Garrett Community College has failed to meet its obligations, if any, to implement the Maryland desegregation plan. Nonetheless, according to Mr. Gerry, and according to HEW, Garrett Community College was in violation of title VI. The reason for this alleged violation was Mr. Gerry's notion of collective responsibility for title VI compliance, supposedly shared by all institutions of public higher education situated in the State, whether operated by the State itself or by its political subdivisions. Under the HEW theory, Garrett Community College would be held responsible for the existence of an alleged title VI problem at predominantly black Morgan State University, notwithstanding that Garrett might be absolutely powerless to affect Morgan's alleged problem.

[16] Garrett Community College, with a 1974 enrollment of 146 full-time equivalent students, is a commuter institution located in far western Maryland. It has no residence facilities and is intended to serve Garrett County, Maryland, although students from other counties may attend if they are willing to pay a tuition premium. The percentage of black prospective students residing in Garrett County, Maryland, is zero. The Maryland Plan for Completing the Desegregation of the Public Post-Secondary Education Institutions in the State, unconditionally accepted by HEW in June of 1974, establishes as a 1980 mid-range goal a black student enrollment at Garrett Community College of zero percent. This goal reflects the fact that there are no black students in the area served by Garrett Community College and that it is highly unlikely that black students (or any students) from elsewhere in the State would pay higher tuition rates to commute to Garrett Community College or would establish a residence in Garrett County for the purpose of attending Garrett Community College without paying the tuition premium.

At the hearing, there was considerable evidence concerning the widely diverse federal financial assistance distributed to the various institutions of public higher education in the State. The purpose of this evidence was to demonstrate what HEW would have found had it taken a program-by-program and institution-by-institution approach as is required by the statute and regulations.

For example, of the twenty-four million dollars in federal aid received by the Baltimore City campus of the University of Maryland, one-fourth goes to the Baltimore Cancer Research Center, which is totally supported by the National Cancer Institute and is the unique facility in the United States for the study of lymphatic cancer. It serves 37 inpatients per day and 1,000 outpatients per week. But if federal support were lost, the Baltimore Cancer Research Center would have to close its doors, despite the fact that no allegations of discrimination have ever been made against it. In another example brought out in testimony, it was uncontradicted that the majority of federal money going to Towson State University aids black students and, in fact, the school's desegregation efforts have been praised by HEW. Nevertheless, Towson stands to lose three and one-half million dollars annually if the HEW attempt to cut off federal funding is successful. In the face of such testimony, the district court was later to note that all of these programs, "due to the non-programmatic approach assumed, are being condemned by defendants en masse." 411 F. Supp. at 558 (A. 32a).[17]

[17] The court recognized in its opinion that the programmatic approach would reduce HEW's ability to "wield a $65,000,000 . . . sledgehammer. However, that result appears to be a necessary concomitant of protecting the innocent beneficiary of Federal funding." 411 F. Supp. at 559 n.34 (A. 33a n.34). The district court said:

> [T]he beneficiaries under these programs — the cancer victims, disadvantaged students, the ultimate recipients

Final arguments were scheduled for February 20, 1976. Faced with a further threat by HEW to take additional action to the detriment of the State before final relief, however, the State renewed its application for a temporary restraining order on February 18. A hearing was held that same date, and the district court granted the relief sought.

On March 8 the district court filed a 51-page opinion sustaining the contentions in the complaint and indicating the appropriateness of relief. Certain aspects of HEW's dealings with the State were cited by the district court as extraordinary examples of irresponsibility in the title VI administrative process. First, HEW has refused to specify, or even suggest, what constitutes compliance with title VI and what steps ought to be taken to achieve that compliance. The district court noted that "[t]he record bears witness to the absolute dearth of definitive standards provided by defendants, as well as the numerous requests for guidance by the plaintiffs." 411 F. Supp. at 550 (A. 16a). The title VI regulations provide no guidance whatsoever. Entitled "Non-Discrimination under Programs Receiving Federal Assistance Through the Department of Health, Education and Welfare — Effectuation of title VI of the Civil Rights Act of 1964," they have never contained any standards for institutions of higher education.

> of the health care programs, etc. — should not suffer for the sins of a program not administered in accordance with this Act. For instance, the cancer patients receiving treatment at the Baltimore Center, should not be compelled to face imminent discontinuance of the Center with the concomitant inability to obtain vital treatment, nor should the minority students, many of whom are totally dependent on federal funding, be fearful of loss of government aid due to an agency's misdirected attempts to enforce the Civil Rights Act.

411 F. Supp. at 561 (A. 37a).

In light of the evidence, the district court was compelled to conclude that the HEW refusal to adopt a programmatic approach was "vindictive." 411 F. Supp. at 563-64 (A. 42a).

Indeed, they do little more than reiterate the statutory prohibition against discrimination in general.[18]

Another aspect of HEW's conduct specially noted by the district court was the refusal to implement a consistent policy regarding the importance of statistics. From the very first communication of March 12, 1969, it is clear that HEW premised all of its findings of noncompliance upon statistics.[19] Despite the repeated

[18] In expounding on the State's inability to comply with the three-week deadline imposed in 1973 after the three-year period of HEW inaction, Governor Mandel reiterated a number of the questions that Maryland had then been asking for more than four years, stating, "[W]e need to have specific answers." "What is the minimum acceptable black component at each institution?" "[W]hat does [HEW] favor for quantifying compliance with Title VI?" "Does [HEW] require a student composition roughly equivalent to the racial composition of the State's population?" "What does 'elimination of racial identifiability' really mean?" No answers were ever forthcoming to these questions.

Indeed, Dr. Thomas B. Day then Vice Chancellor of the College Park Campus of the University of Maryland and a member of the Governor's Desegregation Task Force, testified to his "impression that somehow there had been a decision [that HEW] would not give us guidelines, that we would just submit a draft and they would say, well, that's pretty good but try harder and we would submit another draft and they would say that's better, try harder, and never got out of that mode." Dr. Day's impression was correct, as confirmed by a memorandum from Defendant Gerry, quoted by the district court, wherein he recommended against giving guidance to the State and stated: "[I]t would seem prudent to place the burden for developing a plan on the State. If we make specific suggestions we are as a practical matter stuck with them whether they 'work' or not." 411 F. Supp. at 551 n.21 (A. 18a n.21).

[19] In then-Lieutenant Governor Lee's words:

> There was a continuing absence of firmness as to the significance of numbers. Whenever the Department made a Complaint that the State was not doing right, in their eyes, they seemed to base it on the numbers, on the racial composition in the several institutions. But if you ask them whether the numbers were important, they would say no . . . . And then we would ask them how do

disavowals by HEW if the importance of numbers, the final decision to commence administrative enforcement proceedings against the public institutions of higher education in the State was premised on statistics concerning the race of students enrolled at the various institutions.[20]

The district court summarized the testimony with respect to the use of statistics as follows:

> Evidenced throughout the entire course of dealings are myriad examples of defendants' duplicitous posture in regard to statistics. While repeatedly denying that their decisions were based on statistics, the defendants nevertheless consistently explicated Maryland's violation of Title VI by citing statistics.

411 F. Supp. at 551-52 (footnote omitted) (A. 18a-19a).

As noted by the district court, related to the problem with statistics has been failure by HEW to adopt a

> you measure the results of the process that they were so interested in, aimed at eliminating racial identifiability, and they'd say — then you'd come back to the numbers, the only way you can measure the success, the results, the only way you can quantify the success is by looking at the numbers, the racial composition. But the numbers, mind you, are not important . . . .

Dr. Day gave similar testimony concerning the "very significant apparent inconsistency in the posture about numbers."

[20] In his letter to Governor Mandel of December 15, 1975, Defendant Gerry stated:

> More serious than Maryland's failure to implement its plan is the segregation which continues to exist at the post secondary institutions throughout the state . . . . [T]he percentage of black students at the predominantly black colleges in the State system was 86.9 in 1974, while the percentage of black students at the predominantly white senior institutions was 7.4 for the same period. *These figures clearly reveal that the State is continuing to operate a dual system of higher education.* (emphasis supplied).

consistent policy with respect to the maintenance of predominantly black institutions of higher education. These institutions are, in HEW's admitted view, the major source of the title VI problem in the State, but HEW has been consistently ambiguous as to whether they will be permitted to retain their racial characteristics.[21]

[21] Testimony on this important, unanswered question was given by Dr. Andrew Billingsley, President of Morgan State University, and an expert in the field of higher education, particularly higher education of black students. Dr. Billingsley indicated that the HEW position "attacks the predominantly black character of those institutions and ignores the importance of their history and their culture." Dr. Billingsley noted that Morgan State University is today a predominantly black institution because of voluntary selection by students. He testified to the absence of any influence by the State which affected the choice of Morgan State University by its students.

The purpose of Dr. Billingsley's testimony was not to demonstrate that he is correct about the need for maintenance of predominantly black institutions. Rather, the purpose was to demonstrate that, in this area of serious educational concern, the crux of Maryland's alleged violation, HEW was acting to destroy the racial character of predominantly black colleges without ever articulating that policy or any policy concerning them. As early as 1970, then-Lieutenant Governor Lee posed to HEW the question of the survival of the predominantly black institutions, but it was not answered at the time and has not been answered to this day. Indeed, at one time, HEW suggested that the problem of increasing the percentage of black students in historically white institutions might be settled by importing "a lot of black students in from other states."

Despite enforcement activities directed toward destruction of the predominantly black institutions, HEW's public pronouncements have been that the institutions should be enhanced and that it has "no objection to institutions that were predominantly black in racial composition." By contrast, Respondent Taylor testified that in order for the State to demonstrate a prima facie case of compliance with title VI it would be necessary for the racial characteristics of each public institution to reflect the racial characteristics of the State as a whole. In fact, as early as November 1969, HEW was taking the position that all colleges must be made

Characterizing the HEW title VI enforcement activities with respect to the State of Maryland, the district court found that respondents "have not followed the mandates of the Act in that they have arbitrarily and whimsically failed to attempt to work toward compliance by voluntary means and have vindictively refused to assume a programmatic approach." 411 F. Supp. at 563-64 (A. 42a). At the direction of the court, and with the participation of counsel for HEW, counsel for the State prepared an order conforming to the opinion, which order was signed by the court on March 9, 1976 (A. 44a). Counsel for HEW did not object to the form of the order except in one aspect which was not raised on appeal.

Review By the Court of Appeals

On March 24, 1976, HEW filed its notice of appeal. HEW then sought from the district court a stay of the order pending appeal, which was denied by the district court on April 20, 1976. 417 F. Supp. 57 (D. Md. 1976) (A. 48a). On May 28, 1976, the court of appeals also denied a stay pending appeal (A. 52a). In the same order, the court of appeals consolidated the appeal with HEW's appeal in the Baltimore City case (involving its elementary and secondary schools) that had been decided by the district court at the same time as the State's case and deferred suggestions for in banc consideration of the cases. Thereafter, extensive briefs were filed by the parties, as well as by various amici curiae on behalf of HEW[22] and the State.[23]

"majority white quickly" and that the institutions must "approximate the ratio of black and white students in the state as a whole who attend college."

[22] The NAACP Legal Defense and Educational Fund Inc., appeared as amicus curiae in support of HEW.

[23] The nations's five leading associations in the area of higher education (The American Council on Education, The Association of American Universities, The National Association of State Universities and Land Grant Colleges, The

On December 9, 1976, the consolidated cases were argued before a panel of the court of appeals, which recessed and announced that in banc reargument would be granted. An order to that effect was entered the next day (A. 53a).

The court of appeals, sitting in banc, heard reargument of the consolidated cases on February 14, 1977, at which time all seven judges then in regular active service participated. On August 7 an opinion was filed, noting the concurrence of four judges (including the Honorable J. Braxton Craven, Jr., who had died in the interim on May 3), which held that HEW's failure to adopt nondiscrimination guidelines applicable to higher education rendered its attempted initiation of fund termination administrative proceedings *ultra vires* and that an injunction against initiation of such proceedings was proper. The opinion, however, directed the district court to reissue its injunction to set a timetable for HEW to issue nondiscrimination guidelines, the State to submit a revised plan for complying with them, and HEW to accept or reject it.[24] 562 F.2d

American Association of State Colleges and Universities, and The American Association of Community and Junior Colleges), The National Association of Attorneys General, and thirty-two States and Commonwealths (The States of Alaska, Arizona, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming, and the Commonwealths of Kentucky and Virginia) all appeared as amici curiae in a single such brief supporting the State. In addition, two separate briefs supporting the State's position were filed by the Commonwealth of Pennsylvania as amicus curiae and by the Trustees of the California State University and Colleges and the Regents of the University of California as amici curiae.

[24] By the same opinion the court of appeals reversed the injunction in the Baltimore City case, remitting the City to its fund termination hearing, and rejecting in the process the

914 (4th Cir. 1977) (A. 75a). Three judges, in two separate opinions, dissented on the basis that the district court's injunction was appropriate.[25] 562 F.2d 914, 925-28 & 928-33 (A. 57a, 75a-80a & 80a-90a).

On August 22 the State filed a motion to withdraw the opinion and to modify the judgment, and, in the alternative, a petition for rehearing in banc, on the principal ground that the vote of Judge Craven should not have been counted in forming a majority of the court and urging that because the remaining six members of the court were equally divided, the district court's injunction should be affirmed.[26] After directing an answer from HEW, and receiving it on September 22, the court of appeals, on February 16, 1978, granted the State's motion and affirmed the district court's injunction by an evenly divided court.[27] 571 F.2d 1273 (4th Cir. 1978) (A. 91a). Judge Winter, alone, dissented from the affirmance, but not from the withdrawing of the earlier judgment of August 9, 1977. He noted

> This case is an important one with national implications . . . .
>
> . . . .
>
> Although the cases were decided in the district court by the granting of a preliminary injunction, an analysis of the record and the evidence before the district court makes it clear that on remand the

City's argument that title VI required programmatic enforcement. 562 F.2d at 922-24 (4th Cir. 1977) (A. 69a-73a). The State's similar argument was not reached by the opinion, although it apparently was implicitly rejected. 562 F.2d at 924 (A. 69a-70a).

[25] They also believed that the injunction in the Baltimore City case should have been affirmed.

[26] A similar motion was filed by Baltimore City in its case the following day.

[27] In the same opinion, the court of appeals withdrew its previously filed opinions in both cases and similarly affirmed the district court injunction in the Baltimore City case.

> entry of a permanent injunction will be a *pro forma* action. From the very full record before us, it is inconceivable to me that there is additional evidence to be considered by the district court . . . .
>
> . . . .
>
> . . . . [I] think that we quite unnecessarily subject the parties to the formality of the entry of a permanent injunction and the expense and inconvenience of a second appeal when it is perfectly obvious that we can give no definitive answer to the basic questions presented by these consolidated appeals until there is a full court.

571 F.2d at 1276 & 1277 (A. 94a, 95a, & 96a).

Respondents thereafter sought, and obtained on February 28, 1978, an extension within which to seek rehearing in the consolidated cases (A. 97a), but no rehearing was sought. Subsequently, on May 5 HEW sought an extension of time until June 16 to file a petition for certiorari in this Court, apparently only in the Baltimore City case. On May 8 petitioners sought an extension that would permit additional time in the State case. By separate orders, granted on May 15, the Chief Justice extended HEW's time in the Baltimore City case until June 16 and petitioners' time until July 16 in this case. While, without explanation, no petition was filed in the City case, this petition has been timely filed by the State because of the pressing need to resolve at the earliest possible date the issues of national importance it presents.

REASONS FOR GRANTING THE WRIT

REVIEW BY THIS COURT NOW IS NECESSARY TO DECIDE URGENT FEDERAL LAW QUESTIONS OF NATIONAL IMPORTANCE REQUIRING PROMPT AUTHORITATIVE RESOLUTION

> *"It was our desire to comply with Title VI in every way, in every way that made sense, as long as it didn't involve literally destroying our higher education system."* [411 F. Supp. 542, 550-51.]

These words, from the testimony of then-Lieutenant Governor Blair Lee III before the district court, explain perhaps better than any others the reasons for this petition. The commitment of petitioners to the ideals of title VI (and for that matter to the proposition that no resource, State or federal, be used in a racially discriminatory manner) is unswerving, and thus petitioners believe that review by this Court is necessary now to decide authoritatively the urgent federal law questions of national importance that this case raises.[28]

Upon an exceptionally full record, the district court found, and on this point the court of appeals unanimously affirmed, that respondents had acted "patently in violation of the prescriptions of [42 U.S.C.,] Section 2000d-1." 411 F. Supp. at 553 (A. 22a). The lower courts held that respondents had deliberately disregarded the provisions of title VI throughout their dealings with the State. They had refused to focus on particular federal statutory aid programs to determine the existence of discrimination. Instead, they had threatened all programs for the apparent purpose of adding to the coercive strength of their demands for restructuring the

[28] *See* Trans World Airlines v. Hardison, 432 U.S. 63, 70 n.5 (1977), in which the Court discussed its grant of certiorari to a prevailing party in the court of appeals. *Cf.* United States v. Lovett, 328 U.S. 303 (1946), where the Court decided a case in which the Solicitor General filed for certiorari even though the Court of Claims had adopted his views.

system of higher education in the State. They had ignored the statutory command to promulgate regulations generally applicable to aid programs supporting higher education. Instead, despite repeated requests for specificity, respondents had consistently refused to provide state officials with standards by which compliance could be determined. The had refused to comply with 42 U.S.C. § 2000d-6 which requires that title VI be applied uniformly in all regions of the United States whatever the origin or cause of alleged segregation. Instead, they had applied title VI only to states with a history of legal segregation. Title VI requires that once a violation has been identified, there be efforts to secure compliance by voluntary means. The lower courts have held that respondents' actions during the period of alleged efforts toward voluntary compliance were arbitrary, whimsical, vindictive, and in bad faith.

The district court's order (A. 44a), now affirmed on appeal, stops respondents "from asserting that there is non-compliance with Title VI in the administration of any and all statutory aid programs . . . on the basis of non-compliance alleged to exist in any other program's and/or any other institution . . . ." In addition, the order enjoins respondents from initiating fund termination proceedings or otherwise deferring or interfering with the award of federal funds to the public institutions of higher education in the State unless and until respondents shall have complied with the procedures established by title VI itself. Specifically, before taking any such actions, HEW officials must promulgate uniform regulations of nationwide applicability setting standards for compliance with title VI which shall apply equally whatever the cause of discrimination, determine which if any aid programs administered by public institutions are not in compliance with these regulations, and attempt in good faith to achieve compliance by voluntary means.

Thus, the district court's disposition stands as an indictment, conviction, and probationary order respecting respondents' nationwide policy of administering title VI. In addition, as noted by Judge Winter in the withdrawn "majority" opinion of the court of appeals, "the decree entered by the district court effectively terminates the litigation." 562 F.2d 914, 925 (4th Cir. 1977) (A. 74a). More importantly, however:

> Since the district court did not enjoin the secretary from carrying out his duties under Title VI, and since Title VI requires him to take steps to achieve compliance, the preliminary injunction may be fairly characterized as a mandatory injunction requiring the Secretary to take the various actions set forth . . . .

571 F.2d 1273, 1276-77 (4th Cir. 1978) (Winter, J., concurring and dissenting) (A. 91a, 95a). Accordingly, it is clear that this case raises issues of exceptional importance. Petitioners believe, further, that there are other independent considerations which favor granting the writ.

First, title VI of the Civil Rights Act of 1964 is applicable to all educational institutions which receive federal funds. Virtually every junior college, college, and university in the United States is affected by HEW's title VI enforcement policies and procedures, because their teachers or professors receive grants from the federal government, because their students receive federal scholarships, grants, or loans, or because the schools themselves directly administer federal programs in research or teaching. Thus, all institutions of higher education and many students at those institutions are in peril of losing crucial federal financial support simply because HEW illegally refuses to promulgate the standards (clearly required by 42 U.S.C. § 2000d-1 (1970)) by which such institutions may ensure their compliance with title VI.

Many state governments are, moreover, being coerced by respondents to devise and implement statewide plans for their public institutions without any meaningful guidance about what the federal government requires.[29] All such states are threatened with the loss of significant revenue if the plans and actions taken to implement them do not conform to unwritten, unarticulated, inconsistent, and ever-changing standards which exist only in the minds of certain federal bureaucrats. The district court found, on the basis of substantial evidence, that respondents not only refuse to establish regulations of general applicability or even to provide to the states coherent informal guidelines for determining compliance, but refuse to specify which programs they feel are discriminatory. The national interest requires that HEW's procedures in this area be carefully considered by this Court at the earliest possible date.[30]

Other state governments feel as strongly about respondents' title VI enforcement activities in the area of public higher education. Thus the Attorneys General of thirty-four other states and commonwealths signed amici curiae briefs supporting petitioners in the court of appeals. The concern of other state governments is

[29] HEW's Revised Criteria Specifying the Ingredients Of Acceptable Plans to Desegregate State Systems of Public Higher Education, 42 Fed. Reg. 6658-66 (1978), merely reiterate respondents' hopelessly inconsistent stance that predominantly black institutions should be "enhanced" but "racial identifiability" eliminated. In any event, these criteria only provide guidance for the "guilty"; they do not address how one determines title VI compliance.

[30] The district court's opinion gave another reason why this case is of national interest. The court noted that "at least an inference could be drawn that HEW was attempting, not merely desegregation of the Maryland systems, but to place Maryland in the position of being the guinea pig for HEW's compliance efforts," which would in itself violate title VI. 411 F. Supp. at 559 n.35 (A. 33a n.35). *See* 42 U.S.C. § 2000d-6 (1970).

clear evidence that this case is of national importance and deserves consideration by this Court.

Second, the amount of funds involved in HEW's proceedings against the public institutions of higher education in the State of Maryland is enormous. As the district court noted in its opinion, public institutions of higher education in Maryland receive from HEW approximately sixty-five million dollars in federal funds annually. 411 F. Supp. at 559 (A. 34a). Those funds support a wide variety of programs, from financial aid to minority students, to varied research projects, to medical and health care programs, including the unique lymphatic cancer research and treatment center in the United States. Many if not all of those programs would cease if federal funds distributed through HEW were stopped. 411 F. Supp. at 560-61 (A. 35a-37a). The various institutions themselves would suffer severe consequences from the loss of federal funds. Many tenured professors receive some or all of their salary from federal sources. Many students would not be able to matriculate and pay tuition without federal grants or loans. As Dr. Andrew Billingsley, President of Morgan State University, stated, four million dollars of that school's sixteen million dollar budget was derived from federal funds, and without them, "[i]t would destroy Morgan University and the other black colleges in the State." 411 F. Supp. at 560 (A. 35a). Few, if any, public institutions of higher education could survive a denial of federal funds.

For fiscal year 1976, the State of Maryland expended two million three hundred thousand dollars to implement its 1974 plan to assure the elimination of any segregation in public institutions of higher education in the State. That amount has increased to over four million three hundred fifty thousand dollars for fiscal year 1979. As the district court stated in its opinion:

> [Much of those sums] could be preserved if HEW were to supply some specificity of discriminatory programs. Furthermore, like ripples on a pond, impending loss of up to $65,000,000 seriously disrupts the State's financial condition. Unable to determine whether all, or only some, of the federal funds will be lost, the State's ability to properly budget and appropriate are severely impaired.

411 F. Supp. at 561 (A. 38a).

It is obvious that other states, in order to satisfy HEW, are also expending enormous amounts of money to meet uncertain and shifting standards. Thus, the amount at issue in this case provides additional justification for granting this petition.

Third, respondents refuse to confront the question of whether or not they will permit predominantly black colleges to continue to exist. The district court noted, and both sides recognized, that this issue poses an enormous problem. On one hand, black colleges are seen as positive influences toward social equality.[31] On

[31] In Adams v. Richardson, 480 F.2d 1159, 1165 (D.C. Cir. 1973), the court noted: "As amicus points out, these Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education."

The district court in this case heard direct testimony on this point. Dr. Andrew Billingsley, President of Morgan State University and author of *Black Families in White America*, talked on cross-examination about the role of predominantly black institutions:

> Institutions differ in their characteristics, in their culture and in the effectiveness at working with certain kinds of students and having certain effects and results.
>
> It happens that blacks are grossly under-represented in colleges. They constitute about sixteen percent of the college age population but only about eight percent of the college going population and while most of those are enrolled in predominantly white institutions, it happens that most of those that graduate, graduate from predominantly black institutions. So these institutions are very effective in educating particularly black youngsters who have had difficult backgrounds before they came to college.

the other hand, HEW's extreme reliance on statistics seems to have caused these schools to be branded by HEW bureaucrats as "racially identifiable" and therefore outlawed by title VI. This practice apparently reflects the implementation by HEW of another unwritten policy, a policy which could not even be articulated by respondents' counsel. 411 F. Supp. at 553 (A. 21a). Although respondents have refused to take any position on the permissibility of the existence of predominantly black institutions, their internal memoranda (disclosed only after a strenuously resisted court order) demonstrate their secret view that these institutions must quickly be made majority white. 411 F. Supp. at 553 n.24 (A. 21a n.24).

This petition presents to the Court the question of whether respondents may defy the provisions of title VI by refusing to adopt regulations applicable to higher education, by refusing to concentrate on discrimination in particular programs of federal financial assistance, and by refusing to apply uniform regulations to alleged discrimination without regard to a history of racial segregation. In this defiance, respondents' actions threaten the abolition of the predominantly black institutions under an unofficial, unexplained, and inexplicable theory of "eliminating racial identifiability." Petitioners urge that this question of the limits of federal bureaucratic authority would best be decided by the Court at this time.

Finally, this litigation does not raise the issue of discrimination by public institutions of higher education in Maryland.[32] The only issues raised relate to whether respondents acted illegally in initiating administrative enforcement proceedings against the institutions. Title VI prohibits discrimination in programs of

[32] Petitioners submit, however, that the record demonstrates both an absence of discrimination and full compliance with title VI.

federal financial assistance. Respondents have admittedly refused to examine programs. Title VI requires federal agencies to adopt regulations of general applicability which would take into account the varying purposes of federal financial assistance.[33] Respondents have admittedly refused to adopt regulations applicable to institutions of higher education. Title VI requires that federal agencies engage in good faith efforts at voluntary compliance. Respondents have acted arbitrarily, whimsically, vindictively, and in bad faith. Instead of obeying the statute, respondents have attempted to govern higher education in Maryland and to completely restructure many of its institutions.

The allegation and proof that HEW acted *ultra vires* in ignoring the dictates of title VI in administering it with respect to the public institutions of higher education in the State of Maryland raises a question of exceptional importance to a federal system of government. No federal official should be permitted to ignore the law's limitations on his authority so that he might impose his views of justice on the states and their citizens. In so acting, he disregards the will of Congress and the powers reserved to the states by the Constitution.

For courts to determine, as they have in this case, that federal officials have acted "in contravention of Title VI," and have treated a state and its public institutions "arbitrarily," "whimsically," and "vindictively" (411 F. Supp. at 563-64 (A. 42a)) is indicative of

[33] As members of this Court recently observed in Regents of the University of California v. Bakke, 46 U.S.L.W. 4896, 4915 (U.S., June 28, 1978) (Justices Brennan, White, Marshall, and Blackmun concurring and dissenting), Attorney General Robert F. Kennedy testified that regulations were not written into title VI itself "because the rules and regulations defining discrimination might differ from one program to another so that the term would assume different meanings in different contexts."

an enormous strain in the whole federal-state relationship. In this unfortunate posture, the courts, and particularly this Court, should reestablish the proper balance. Thus, the current case raises the most serious of questions, going to the central principle of our system of government.

Title 28, United States Code, Section 1254(1) authorizes this Court to allow review "By writ of certiorari granted upon the petition of *any* party to any civil . . . case, before or after rendition of judgment or decree" (emphasis added). Petitioners urge that even though they now have prevailed in the court of appeals, it is appropriate to grant this petition for certiorari.

CONCLUSION

Petitioners believe that the order of the district court is proper in all respects. Nevertheless, in their own right and on behalf of all others affected by title VI nationally — not only the other thousands of recipients but the millions of intended beneficiaries of the myriad federal statutory aid programs: taxpayers, cancer patients, the ill and indigent dependent on medicare and medicaid, students of all races, and particularly minority group members — petitioners seek review in this case.

Petitioners' hope is not merely that the order of the district court will be affirmed. Indeed, their chief interest is not to achieve victory but to establish justice.[34] Thus, whatever the decision by this Court if certiorari is granted, petitioners and those whose interests they represent in filing this petition will be well served.

[34] *See* Brady v. Maryland, 373 U.S. 83, 85 n.2 (1963).

For these reasons, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully submitted,

FRANCIS BILL BURCH,
Attorney General of Maryland,
GEORGE A. NILSON,
Deputy Attorney General,
DAVID H. FELDMAN,
Assistant Attorney General,
Chief of Litigation,
WALTER G. LOHR, JR.,
Special Assistant Attorney General,
1400 One South Calvert Building,
Baltimore, Maryland 21202,
(301) 383-3737,
Attorneys for all Petitioners except Petitioner Board of Trustees of the Community College of Baltimore,

BENJAMIN L. BROWN,
City Solicitor of Baltimore,
AMBROSE T. HARTMAN,
Deputy City Solicitor,
WILLIAM HUGHES,
Chief Solicitor,
City Hall,
100 North Holliday Street,
Baltimore, Maryland 21202,
(301) 396-3100,
Attorneys for Petitioner Board of Trustees of the Community College of Baltimore.